OTHER AUTHORITIES CITED

IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1970

No. 430

SALLY M. REED
Appellant,

v.

CECIL R. REED, Administrator,
In the Matter of the Estate of
Richard Lynn Reed, Deceased
Respondent

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF IDAHO

BRIEF FOR RESPONDENT

RENEWAL OF MOTION TO DISMISS APPEAL

Respondent renews his motion to dismiss the appeal heretofore filed herein, particularly on ground II thereof and presents the following argument applicable thereto and to the merits.

QUESTIONS INVOLVED

There are two questions involved in this appeal,

I.

Is there a substantial federal question involved?

II.

Does Section 15-314 of the Idaho Code, insofar as it prefers males to females in the right to letters of administration of a decedent's estate, and incidentally the portions of Idaho Code Sec. 15-312, insofar as affected thereby, violate the equal protection clause of Amendment 14 of the United States Constitution?

ARGUMENT

I.

We will take up these two points separately although the arguments to a considerable extent overlap.

Considering the first question, Chapter 110 of the Idaho Session Laws of 1971, Vol. I, p. 233 adopted a substantially new Probate Code for Idaho, effective July 1st, 1972, repealing the sections of the code in controversy here. Repealed at p. 374, Sec. 5. This new law was not adopted because of any dissatisfaction with Sections 15-312 and 15-314 of the Idaho Code but because of the current public criticism prevalent in the country of the time and expense involved in probate proceedings, which is illustrated by this case.

The new classification statute establishing priorities in the rights of persons seeking appointment as administrator appears as Sec. 15-3-203, Vol. 1, p. 275, Idaho Session Laws 1971. The same

Section at p. 277 provides that only those 21 years of age are competent to act, however it also provides that those 18 years of age may nominate, and expressly qualifies married women. Single women are not disqualified, nor males preferred.

Considering the history of Sections 15-312 and 15-314 of the Idaho Code, these were taken verbatim from the Probate Practice Act of the State of California of 1851, Sections 52 and 53, Chapter 124, p. 454, Statutes of California, 1851, adopted in Idaho as Sections 52 and 53 of the Probate Practice Act, p. 335, Idaho Session Laws 1864 (1st Territorial Session). Idaho, just having been created a territory, needed a pattern. The California Code had been in successful operation in California for a period of 12 years, and the conditions in California and Idaho were much the same in pioneer days.

There was also a provision in the code disqualifying married women, Sec. 54, Idaho Session Laws 1864, p. 335, similar to the Utah Statute criticised by appellant, however, this was deleted by the Idaho Legislature by Chapter 174, 1921 Session Laws, p. 369, amending Section 7479 of the Idaho Compiled Laws of 1919.

The California statute was originally taken from the state of New York. I have been unable to trace the origin of this law in New York, however,

it is cited and applied in Coope v. Lowerre, Barbour's Chancery Reports, Vol. I, p. 45 (N.Y. 1845). It appears from McKinney's Consolidated Laws of N.Y. Ann., Bk 58A, Sec. 1001, note at p. 11, that the provision preferring males to females was deleted from the New York statute but the date does not appear.

Much of the Idaho statute law was originally taken from California and the courts of Idaho, particularly in an early day, looked for the construction placed on similar statutes by the California Courts because many of the Idaho statutes were adopted from California and there was a derth of decisions in Idaho. The Idaho Court considers the decisions of other states persuasive, but, not binding precedents. Oneida County Fair Board v. Smylie, 86 Idaho 341, 386 P.2d 374.

The statutes in controversy were also enacted by Montana in 1877 and were also taken from the California Code. Montana Laws 1877, Sec. 56, p. 253. Montana Statutes 1947, Sec. 91-1401, 91-1402. In re Welscher's Estate 77 M. 164, 250 p. 447 (1926).

The provisions of these statutes specifically preferring males to females have been applied whenever they have come before the courts: Coope v. Lowerre, supra; Wickwire v. Chapman, 15 Barbour 302 N.Y. (1853) Lussen v. Timmerman, 14 N.Y. Surrogate Reports N.Y. (1885) (Demarest 4) p. 250;

In re Wood's Estate, 17 N.Y.S. 354 (1891); In re Coan's Estate (1901) 132 Cal. 401, 64 Pac. 691; In re Welscher's Estate, supra; In re Kern's Estate, 96 M. 443, 31 P.2d 313 (1934); Ed Schaumloeffel v. Mary Schaumloeffel (1946) (Maryland) 46 A2d 692: 164 A.L.R. note p. 859; and the Idaho case which is the subject of this appeal, Reed v. Reed, 93 Idaho 511, 465 P.2d 635. Their constitutionality has never before been questioned.

Probate preference statutes have been followed generally, and held to be mandatory. Vaught v. Struble, 63 Idaho 352, 120 P.2d 259; Skaggs v. Cook (Ky) 374 S.W.2d 857; In re D'Adamo's Estate, 212 N.Y. 214, 106 NE 81, L.R.A. 1915 D. 373; Matter of Campbell's Estate, 192 N.Y. 316, 85 N.E. 392, In re Murphy's Will, 103 N.Y. S.2d 148; Executors and Administrators, 33 C.J.S. Sec. 31, p. 921.

The Idaho Statutes have been on the statute books in Idaho ever since 1864, until acted upon by the recent session of the Idaho Legislature, and no other bill had ever been introduced to repeal or amend these statutes. Long acquiesence in a law and cpnsistent history of state practice requires a strong case to declare it unconstitutional, and this is not such a case. Frank v. Maryland, 359 U.S. 360.

During this long acquiesence, women in Idaho, have had the right to vote on an equal basis with

men ever since 1896, by amendment to Article 6, Section 2 of the Idaho Constitution. Idaho Code Vol. I, p. 150. Idaho women have therefore joined in the common consent to this statute. This Idaho Amendment was authorized by an all male legislature and ratified by an all male electorate.

The Idaho Supreme Court in the decision appealed from considered the question of the constitutionality of the Idaho statute in question under the United States and Idaho Constitution. Appellant has cited Article I, Section I, of the Idaho Constitution. The Idaho Court cited in support of its decision holding the statute constitutional as one authority, Rowe v. City of Pocatello, 70 Idaho 343, 218 P.2d 695. Two other Idaho cases holding that a statute has a presumption of constitutionality are Oneida County Fair Board v. Smylie, supra, and Employment Security Agency v. Joint Class "A" School District, 88 Idaho 384, 400 P.2d 377.

See also Craig v. Lane, 60 Idaho 178, 89 P.2d 1008, and State v. Nadlman, 63 Idaho 153, 118 P.2d 58, which hold that rights guaranteed by the Idaho constitution are those specifically enumerated therein or which existed by common law or statute at the time that document was adopted.

The statute in question was enacted in 1864, the 14th Amendment in 1868. The 14th Amendment was not enacted to prohibit the enactment of laws

making a distinction on the basis of sex. Minor v. Happersett, 21 Wall, 162; Bradwell v. Illinois, 16 Wall, 130; In re Lockwood, 154 U.S. 166. While the question raised in these cases was the claimed abridgment of the privileges and immunities clause of the 14th Amendment, and neither the court or counsel considered the equal protection clause material, the cases, particularly Bradwell v. Illinois, supra, contain a good discussion of what rights were guaranteed by the 14th Amendment, made at a time near the enactment of the Idaho statute in question.

Appellant likens women to slaves and claims they have been discriminated against as though they were an alien race, neither of which arguments are valid. Women are not slaves and they are in a different situation than those of a disadvantaged race in that there is not and has not been the prejudice between men and women of the same race as there has been and very often now is prejudice between the races. Furthermore women in the United States have the same right as men to vote and enact laws, and control their status.

Appellant admits by arguing for a suspect classification for women that the 14th Amendment was not enacted to eliminate laws making a distinction on the basis of sex, and that there is no present legal authority for appellant's contention.

Nothing new can be put into the constitution except by the amendatory process. Ullman v. United States 350 U.S. 422.

The recent amendment proposed to the federal constitution wiping out all laws making any distinction on the basis of sex was defeated after a hearing in the Senate before the Senate Committee. Both sides of the question were fully presented, and the Senate Committee decided against the amendment. These proceedings appear in the "Equal Rights Amendment" hearings on S.J. Res. 61 May 5, 6 and 7, 1970, and Equal Rights 1970 hearings on S.J. Res. 61 and S.J. Res. 231, Sept. 9, 10, 11 and 15, 1970, U.S. Government Printing Office, Washington, 1970.

We agree that a sex amendment to the constitution is not the remedy because of the chaos it would cause in the laws, this is well pointed out in 2 Stanford Law Review, at p. 691, Sex, Discrimination and the Constitution. The same chaos would result by adopting appellant's position in this case.

The remedy or remedies should be with the electorate, by state legislatures, where local conditions and needs are better known and responded to than nationally, and by laws in which women have an equal voice. Professor Willowby Kirtland, Professor of Law, University of Chicago, spoke at the hearing against the proposed sex amendment and agrees with this thought as appears from his statement be-

fore the Senate Committee above referred to on September 19, 1970, at p. 87. See also the statement of James J. White, Professor of Law, University of Michigan at p. 193 following on September 11, 1970.

In the case of Labine v. Vincent, __U.S.__, 28 L. Ed.2d 288, 91 S. Ct.__, the court at p. 293, L.Ed. states:

> "These rules for intestate succession may or may not reflect the intent of particular parents. Many will think that it is unfortunate that the rules are so rigid. Others will think differently. But the choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules."***

and at page 294 L.Ed.:

> "In short, we conclude that in the circumstances presented in this case, there is nothing in the vague generalities of the Equal Protection and Due Process Clauses which empower this Court to nullify the deliberate choices of the elected representatives of the people of Louisiana.
>
> Affirmed."

The right to inherit property is not a natural right. In re Mahaffay's Estate (Montana) 254 Pac. 875; Descent and Distribution, 23 Am. Jur.2d Sec. 11, p. 758.

The administration of an estate of a decedent is procedural and is incidental to the right to inherit and the descent and distribution of property. Administration is for a temporary period of time, for a specific and temporary purpose and individuals do not rely on it as an employment and means of livelihood. It is procedural and not a substantive right, and this case does not involve due process of law. The administrator is accountable to the court and women equally protected as appears from the opinion of the Probate Court in this case. Appendix p. 8a.

Furthermore there is no probate jurisdiction in the federal courts in the sense that the federal courts probate estates.

States have always legislated with respect to the descent and distribution of property of decedents and with respect to probate procedure within their respective jurisdictions, and these are matters which should be left to the states.

Labine v. Vincent, supra, Markham v. Allen, 326 U.S. 490-496 (1946); O'Callaghan v. O'Brien 199 U.S. 89 (1905); Sutton v. English 246 U.S. 199 (1918); In re Mahaffay's Estate, supra.

In the case of Sutton v. English, the court said at par. (2-5) of its opinion:

> "By a series of decisions in this court it has been established that since it does not

pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents in rem, matters of this character are not within the ordinary equity jurisdiction of the federal courts; that as the authority to make wills is derived from the states, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of courts of the United States;***"

II.

In considering the second question, we will assume for the purpose of the argument that a substantial Federal question is involved and that it is incumbent upon appellee to justify the statute in question.

The Idaho Probate Practice Act and the Idaho 1st Territorial Session Laws of 1864 do not show from their various provisions that there was any design to consider women inferior to men, to discriminate against women or to "hold them down" as appellant claims. This is evident from these statutes in controversy as women are qualified to act as administrators. Also, see p. 515, Idaho Laws 1864, now Sec. 32-101, Idaho Code, which makes women of lawful age at 18 and men of lawful age at 21 and which construed with Sec. 55 of the 1864 Idaho Session Laws and Idaho Code, Sec. 15-317 providing that an applicant for letters of administration is disqualified unless of lawful age, men;

are disqualified in favor of women from the age 18 to 21. Wickwire v. Chapman, supra, Vaught v. Struble, supra.

The statute in question, Section 15-314 establishes a procedural preference not a disqualification, in that it in effect says, that if both are equally qualified, in other words, if the scales of justice are equally balanced, the court is to prefer the male. Neither does said section prefer the male if he is disqualified.

These probate preference statutes were enacted to provide a guide in Probate Practice. They have been used by the courts of the various states and by the attorneys in the practice to facilitate the probate of estates. They have enabled attorneys to advise clients with reasonable certainty as to the person entitled to be appointed, and thus save the time, trouble and expense of a contest in most cases. They have been and are useful. That another classification might be deemed by the legislature to serve as well appears from recent legislation, though as yet untried.

The legislators in enacting the statute in question knew that men were as a rule more conversant with business affairs than were women. Appellant urges that the activities of women have changed, however, one has but to look around and it is a matter of common knowledge, that women still are not

engaged in politics, the professions, business or industry to the extent that men are. It appears from the appendix to Vol. 2 of the 1971 Idaho Session Laws that there were two women in the Idaho Senate and one in the House of Representatives. The previous legislature, as appears from Idaho Blue Book 1969-1970, with 1968 election returns published by the Secretary of State, for the State of Idaho shows that in the Senate there were two women, one described as a homemaker and one as an attorney, of a membership of 34, and in the House of Representatives three women, an attorney, a registered nurse, and an educator out of a total membership of seventy. This is average.

The Idaho Supreme Court observed there are differences in the sexes created by nature. Much of the criticism of appellant along such lines as classifying women with children and treating them as such may be a misinterpretation of the reasons. We find in all species that nature protects the female and the offspring to propogate the species and not because the female is inferior. The pill and the conception of children in a laboratory and incubation in a test tube, if this occurs, and their rearing in nurseries and children's homes cannot get away from this prime necessity if the race is to be continued, and there will still remain a difference and the necessity for a different treatment.

The statute in question is adequately justified by the well reasoned decision of the Idaho Supreme Court in the decision appealed from and is supported by ample legal authority. Reed v. Reed, supra.

To search history for quotations as to injustices practised by women and men upon each other, and the books and articles by women who are satisfied with being born female would be time consuming and expensive and would serve no useful purpose. It would not demonstrate the thinking of a majority of the women in the United States and would not prove anything. The only way the public sentiment can be satisfactorily gauged is by vote, and women have this right in Idaho on an equal basis as men, and have had this right for seventy-five years.

The briefs of appellant and the amicus curiae contain material which is irrevalent and of more interest to sociologists and legislatures than a court, and more emotional than legal. The gist of appellant's argument is that there "ought to be a law", and if they have briefed the case sufficiently to ascertain the present condition of Idaho Probate Law and the recent indication of the attitude of the Idaho State Legislature as indicated in the 1971 Session Laws they cannot be greatly concerned with this particular case.

This appeal has been taken, briefed and an

appendix ordered and paid for by persons and organizations with no pecuniary interest in the subject matter. The American Civil Liberties Union filed with the Clerk of this Court a bill for $278.39 for printing the appendix and mailed respondent a copy.

An inventory was not filed in the trial court because the proceedings were stayed by the appeals. It appears from Appendix, p. 2a, paragraph III of the petition of Sally Reed that she estimates the estate at $745.00. The Credit Union account of $495.00 was a joint account in the names of the father and son and consisted of the father's earnings, not an asset of the estate, and the other property listed is of doubtful value, and the estate substantially of no value.

The size of the estate does not justify this appeal, and for the purpose of the record respondent objects to the carrying on of the case by those not party to the original record.

For the foregoing legal reasons, respondent respectfully submits that this case should either be dismissed or the judgment of the Supreme Court of the State of Idaho affirmed.

Respectfully submitted,

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